IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ——

JOSEPH FERRARA,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ARGUMENT

THE USE OF A PRIOR CONVICTION TO ENHANCE THE PENALTY PROVIDED FOR THE SUBSTANTIVE OFFENSE AND TO IMPEACH THE PETITIONER DID NOT VIOLATE DUE PROCESS.

A.

WHAT IS NOT INVOLVED IN THIS CASE

The Petition For Certiorari *does not* present the issues of whether the enhanced penalty provision of the Illinois theft statute[1] is constitutional, or whether the Illinois single stage procedure allowing proof of the prior conviction during the trial of the substantive offense violates due process. These questions were decided adversely to Petitioner in *Spencer* v. *Texas*, 385 U.S. 554 (1967) and he does not challenge either the authority or correctness of that opinion here.

Rather, as we understand it, Petitioner contends that:

(1) the use of the prior conviction *to enhance the penalty* violated due process because no "limiting instructions" were given;

(2) the use of the prior conviction *to enhance the penalty* violated due process because the instructions

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[1] Ch. 38, §16-1 Ill. Rev. Stat. (1967) provides that "A person convicted of such theft . . . after a prior conviction of any type of theft" shall be liable to a penalty of one to five years. In this case, the prior conviction was for robbery, which the court below held was included in the description of "any type of theft."

which were given "inferred" that the jury could consider the prior conviction as evidence of the substantive offense;

(3) the use of the prior conviction *to impeach* the defendant violated due process because it was too "remote."[2]

B.

THE ENHANCED PENALTY ARGUMENT

First, it is true that the jury which convicted Petitioner was not instructed specifically that evidence of the prior conviction could not be taken as evidence of the substantive offense, but it was equally true that Petitioner, at trial, offered no such limiting instruction. Under Illinois law it was his duty to do so and, by his failure in this regard, the point was waived.[3]

Second, the argument that due process was violated for failure to give a "limiting" instruction was not raised or passed upon in the Appellate Court of Illinois. That being so, the question cannot be presented to this Court.[4]

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[2] The conviction which both enhanced the penalty and impeached credibility occurred in 1943, 25 years prior to trial in this case. The State did not use a 1938 conviction, also for robbery (Add. Abst. 41), neither did it use a 1965 California conviction for theft, presumably because of the difficulties attending proof of out of state convictions. See Defendant's Brief in the Supreme Court of Illinois, pp. 20-21; States Brief, pp. 13-14.

[3] *See, e.g., People* v. *Lawson,* 328 Ill. 602, 606 (1928).

[4] *Abel* v. *United States,* 362 U.S. 217, 230 (1960).

Third, the argument that the given instructions, presumably State's Instructions No. 12 and 17,[5] "inferred" that evidence of the prior offense was evidence of the offense for which he stood trial, is specious. The jury was simply told in Instruction No. 12 that Petitioner could not be convicted of Count II, the enhanced penalty count, unless he had committed the crime of theft (the elements of which were enumerated) after having been previously convicted of theft. And Instruction No. 17 told the jury that reasonable doubt would justify an acquittal only if the doubt went to a fact "essential and material to constitute the offense charged." Under Illinois law, proof of the prior offense *is* "essential and material" to conviction for second offense theft.[6] It is simply erroneous, therefore, to say, as Petitioner does, that Instruction No. 17 improperly emphasizes only part of the evidence. Read in conjunction with Instruction No. 11 (simple theft) and Instruction No. 12 (second offense theft), it is inconceivable that any jury could believe that if "petitioner's prior conviction was proved but that they did not believe the primary charge was proved, they still were not authorized to acquit." (Pet. 11).[7]

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[5] *See* Pet. 10.

[6] *Cf. People* v. *Ostrand*, 35 Ill. 2d 516 (1966) and *People* v. *Owens*, 37 Ill. 2d 131 (1967).

[7] This argument is further belied by the fact that the jury did convict on Count I, simple theft.

C.

THE IMPEACHMENT ARGUMENT

Petitioner contends that the use of a 25 year old conviction to impeach was so "remote" that due process of law was violated.

We cannot find in the record, however, that this claim was squarely presented to the Appellate Court. There the argument was made that the use of a 25 year old conviction to *enhance the penalty* was too remote.[8] This argument was rejected by the Appellate Court of Illinois as one involving a legislative determination,[9] and is not pursued in the Petition For Certiorari.

Finally, we do not believe that the question of how "remote" a conviction is presents a substantial federal constitutional question in a case where the record is unclear that the point was properly raised below; the state court did not pass on the issue and neither the propriety of impeachment by prior conviction nor the use of a robbery conviction as bearing upon the trait of credibility are attacked. "The far-reaching and important questions [sought to] be tendered by this claim are not presented

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[8] The brief suggestion on pp. 25-27 of Defendant's Brief comes the nearest to presenting the point (remoteness as to impeachment) but the Appellate Court, in its opinion, did not pass on it and it does not appear to have been raised in the trial court. In this respect, the Petition does not comply with Rule 23 (1) (f) of this Court.

[9] *Compare* Ch. 38, §16-1 (theft; no limitation on time of prior offense) *with* Ch. 38, §24-1 (weapons; five year limitation).

by the record with sufficient clarity to require or justify their decision," *Mishkin* v. *New York*, 383 U.S. 502, 512-13 (1966). For this reason, we believe that a grant of the Writ of Certiorari in this case would not be provident.

CONCLUSION

The People of the State of Illinois request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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